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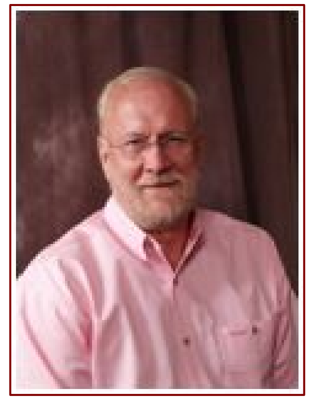
TRANSPORTATION REPORT



To The Montana Wheat & Barley Committee

From: Terry Whiteside

Date: March 6, 2009

AND THE HITS JUST KEEP ON COMING – STB, CONGRESS AND THE STATE OF MONTANA – ISSUING DOCUMENTS SIDING WITH AND SUPPORTING CAPTIVE SHIPPER INTERESTS

Senate Panel OKs Rail Antitrust Act

The Senate Judiciary Committee approved a bill yesterday 14-0, to repeal limited antitrust exemptions for U.S. railroads. The railroad's suffered a stunning defeat with the Committee vote. There were no amendments to the bill. The panel okayed with no changes a measure from Sen. Herb Kohl, D-Wis., that he says would remove obsolete provisions in the law that protect railroads from competition and allow them to gouge captive shippers in freight charges.

"Our bill will ensure that railroads play by the same rules as all businesses in our economy and give those injured by anti-competitive conduct strong remedies under antitrust law," Kohl said. "Over the past several years, railroad shippers of vital commodities have faced spiking rail rates. Rail customers are forced to pass these price increases are passed along into the price of their products, and ultimately, to consumers."

But the American Association of Railroads (AAR) in shrill statement, said the one-two punch of this antitrust measure, plus another bill expected from the Senate Commerce Committee to put railroads under tougher regulation by the Surface Transportation Board, will hit rail lines hard.

"Overlapping regulatory schemes could derail the industry's ability to meet the nation's increased need for environmentally sound freight transportation," said AAR President and CEO Edward R. Hamberger. "We cannot afford to subject railroads to a conflicting regulatory system that will make it difficult --- if not impossible --- to meet the nation's transportation needs."

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Kohl's office said industry consolidation has left the four top U.S. railroads dominating rail freight, and leaving many shippers that are captive to a single long-haul carrier paying high charges without the ordinary protections of antitrust laws. Rail customer challenges to rail practices now have to go through the STB in nearly all instances.

His bill would, among other things, allow the federal government, state attorneys general or private parties to sue railroads to block "anti-competitive mergers and acquisitions," and put rail merger reviews back under the Justice Department's Antitrust Division and the Federal Trade Commission. It would also make it easier for rail customers to fight rail rates, and tell district courts they do not have to defer to STB jurisdiction.

Editor's Comment: The interesting line in this comment is the same old theme the railroads keep banging on - that any legislation or decision which limits their monopoly power is somehow "Re-regulatory." Yet, as the same time they are over at the STB pleading with them to not limit their monopoly pricing power with captive shippers.

Largest Rate Case Award in History:

On February 18, 2009, as we reported in the last Transportation Report, the Surface Transportation Board issued a decision granting an estimated $345 million in reparations and rate reductions from the BNSF Railway (BNSF) to Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively, "the Utilities"). The Utilities had challenged the railroad transportation rates charged by BNSF to haul 8 million tons of coal each year from mines in Wyoming's Powder River Basin to their electric-generating plant at Laramie River Station WY. The utility plant is captive to BNSF and provides electricity into grids serving consumers in Colorado, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Dakota, and Wyoming. In the decision, the Board found the transportation rates BNSF charged the Utilities—which are now roughly six times the variable cost of providing service—to be unlawfully high. BNSF was ordered to lower its transportation rates by approximately 60%, as the Board's stand-alone cost. (SAC) test demonstrated that in 2009 the maximum lawful rate for this traffic cannot exceed a revenue-to-variable cost (R/VC) ratio of 240%. This results in the single largest award to a captive shipper by the Board.

Rail Rates and Service Study Issued by Montana's Attorney General

Attorney General Steve Bullock released on February 26th, an in-depth report on the rates charged to shippers by railroads in Montana. The study, conducted in response to concerns raised by the 2007 Montana Legislature, also examined the service provided to those shipping by rail.

The report, titled *Railroad Rates and Service Provided to Montana Shippers (PDF)*, found that Montana shippers pay the highest rail rates in the country. Burlington Northern Santa Fe Railways (BNSF) controls 95 percent of rail freight transportation in Montana. This lack of competition makes Montana shippers the most captive in the country.

Despite paying the highest rates in the country, according to the study, Montana shippers often receive second-rate service. The drastic decrease in the number of grain elevators over the past two decades—due in large part to the business practices of the largest railroad in the state—has resulted in less reliable service at the elevators and greater distances to haul grain and other commodities to reach them.

Montana Governor Brian Schweitzer said that he would join Bullock in pushing for action at the federal level that will alleviate the burden placed on Montana shippers. Moreover, Schweitzer and Bullock affirmed their commitment to a recent arbitration agreement reached between the railroad and Montana agricultural advocacy groups. Both the Governor and Attorney General said they plan on working with all parties to make sure the new arbitration agreement works.

Schweitzer and Bullock also said that they would continue to work through the Rail Service Competition Council. The 2005 Legislature created the RSCC to promote rail service and competition in Montana.

"The lack of rail competition has caused both excessive freight rates and poor service," Schweitzer said. "Our farmers, ranchers and other rail shippers deserve better."

Bullock is spearheading efforts with the Attorneys General of South Dakota and Ohio to encourage congressional leaders to pass the *Railroad Antitrust Enforcement Act*, federal legislation that would subject railroads to the same antitrust laws that apply to other industries.

"This report clearly documents what Montana farmers and ranchers already know from hard experience—they are being charged excessive rates for substandard service. Shippers need competition and they need a fair rate to move their goods to the marketplace," Bullock said. "My office is going to explore every option we have to make sure that Montana's number one industry, family farm agriculture, is given a fair shake."

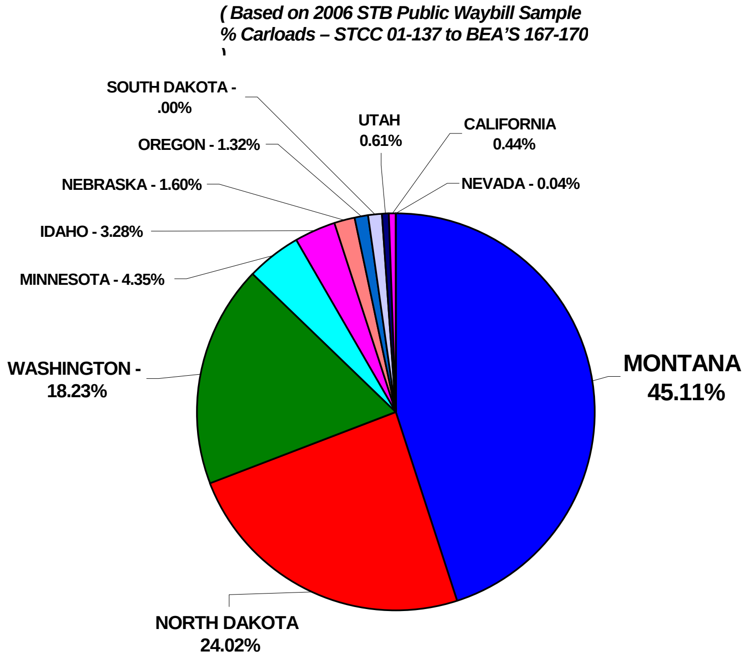
Findings of the report include:

MONTANA PRODUCERS ARE HELD CAPTIVE TO THE HIGHEST RATES IN THE COUNTRY

- Of the five states with the largest volume of wheat shipped by rail, in 2006 Montana shippers paid the highest rail rates whether figured per car or per ton:
    - Montana shippers paid $3,454 per carload compared to $2,623 for Kansas, $2,842 for Nebraska, and $3,336 for North Dakota.
    - Montana shippers paid $33 per ton compared to $26 for Kansas, $27 for Nebraska and $32 for North Dakota.
- BNSF controls 95 percent of rail freight transportation in Montana, resulting in Montana shippers being held the most captive in the country.
- The total overcharge by BNSF of Montana wheat shipments is estimated between $19 and $50 million dollars annually.
- Rail transportation costs have risen from 15 percent of the price of wheat in the late 1970s to double that today.
- BNSF has continued to report increasing quarterly revenues, despite falling freight volumes due to the current economic recession.

Figure 1

2006 RAILROAD WHEAT MOVEMENTS TO PNW



HIGH RATES HAVE NOT GUARANTEED GOOD SERVICE

From BNSF's perspective, it's more efficient to move Montana grain in large trains of 100 plus cars (longer trains from a smaller number of elevators). The railroad has used pricing to encourage 100- car trains, forcing many smaller elevators to go out of business.

While there were nearly 200 elevators in Montana in the 1980s, that number fell to less than 100 in the 1990s, and less than 50 today. Despite the decrease in elevators, grain production has increased throughout that time.

- With this drastic drop in the number of smaller elevators in Montana, many producers are now facing longer distances from farms to elevators. Seventy percent of Montana producers are now hauling their grain further to get to elevators than 10 or 20 years ago.
- Moreover, associated trucking costs have increased, including fuel, truck maintenance and wear and tear on Montana highways.

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- Fewer elevators has also led to a frequency in "plugged elevators" (an elevator that is full and cannot accept more grain until its contents are loaded into railcars) resulting in reduced capacity.
    - The increased number of "plugged elevators" and reduced number of elevators have led to producers holding off on deliveries where in the past they would transport to an alternate elevator.
    - Delays in the ability of producers to bring grain to markets can sometimes mean missing peak grain prices.

COMPARISON OF 2006 RAILROAD WHEAT MOVEMENTS FROM THE FIVE LARGEST RAILROAD ORIGIN STATES TO ALL DESTINATIONS

(STB's 2006 Public Waybill Sample)

LN.	ITEM	KANSAS	MONTANA	NEBRASKA	NORTH DAKOTA	SOUTH DAKOTA
1	Total Tons Originated	6,499,757	6,285,515	2,560,636	10,222,016	3,127,801
2	Total Carloads Originated	63,252	59,584	24,571	98,843	30,639
3	Average Tons Per Car	102.76	105.49	104.21	103.42	102.09
4	Average Shortline Miles	802	1,018	988	992	883
5	Total Railroad Revenue	$165,924,190	$205,802,079	$69,825,696	$329,735,113	$98,784,055
6	Average Rate Per Carload	$2,623.22	**$3,453.98**	$2,841.79	$3,335.95	$3,224.13
7	Average Rate Per Ton	$25.53	**$32.74**	$27.27	$32.26	$31.58

Figure 4
WHEAT SHIPMENTS
TO THE PNW – SHUTTLE SERVICE

STATE	CARLOADS	R/VC
MONTANA	**25,418**	**288%**
NORTH DAKOTA	9,998	242%
MINNESOTA	3,060	238%
NEBRASKA	854	228%
SOUTH DAKOTA	218	254%

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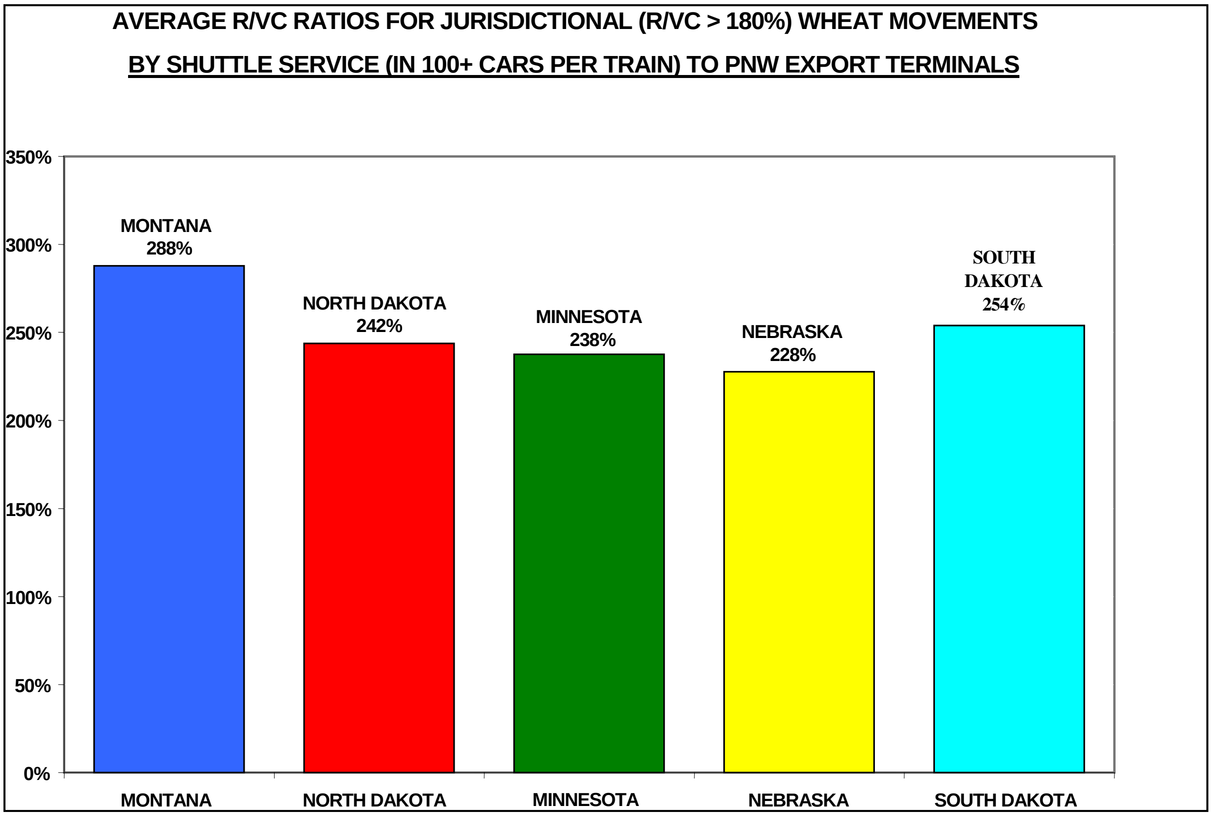
The average of these R/VCs for all five states is 266 percent, and the average for the states other than Montana is 240 percent, well below the Montana average. These relationships are depicted in bar graph form in Figure 5.

Figure 5



The BNSF quickly issued a statement critical of the report – citing outdated data, wrongful conclusions and rhetoric designed to discredit the report.

The report shows that is not the case and includes an explanation of why 2006 data is used, said Kevin O'Brien, spokesman for the Montana Department of Justice. Although the federal agency charged with regulating railroads, the Surface Transportation Board, released 2007 Uniform Rail Cost System data in December, "Montana's consultants have reviewed (it), but discovered so many significant flaws that the 2007 data cannot be considered reliable," the report states. The report chose to utilize the 2006 data and factored them up to 2007.

"The most important thing now, based on BNSF data and legal definitions, is that Montana's grain producers are being charged $19 million to $50 million more than they should be, compared to states with rail competition," O'Brien said.

Montana Farmers Union was highly complementary of the study stating, "the Montana Farmers Union, said the report reveals the situations the state's farmers must deal with as shippers that rely, for the most part, on a single railroad. "

The study was conducted by a team of experts who have represented captive rail shippers for more than 30 years. The team included John Cutler and Andrew Goldstein, of the firm McCarthy, Sweeney & Harkaway, P.C.; G.W. Fauth III of G.W. Fauth & Associates; Thomas Crowley of L.E. Peabody & Associates; and Terry Whiteside of Whiteside & Associates in Billings.

NATIONAL ASSOCIATION OF WHEAT GROWERS AT THE COMMODITY CLASSIC ISSUES TRANSPORTATION RESOLUTIONS SUPPORTING EFFORTS TO PROVIDE LEADERSHIP IN THE ALLIANCE FOR RAIL COMPETITION AND A PUSH FOR STRONGER FINAL OFFER ARBITRATION PROVISIONS IN THE RAIL COMPETITION BILL

II-K-1	NAWG supports the work of the Alliance for Rail Competition, and will take a leadership role in the coalition. (Mar 2008)
II-K-2	NAWG supports requiring a 60 day notice of rail rate increases. (Mar 2008)
II-K-3	NAWG supports competitive access for all rail shippers. (Mar 2008)
II-K-4	NAWG supports the right of reciprocal switching at reasonable cost in markets served by more than one carrier. (Mar 2008)
II-K-5	NAWG supports maintaining an adequate sized national rail grain car fleet and equity in the allocation of those cars among shipper and regions. (Mar 2008)
II-K-6	NAWG supports allowing railroads to transfer lines they plan to abandon to new owners without the new owner having to assume labor contracts. (Mar 2008)
II-K-7	NAWG supports increased STB monitoring of railroad maintenance. (Mar 2008)
II-K-8	NAWG supports allowing a railroad to sell part of its line for the purpose of maintaining rail service. (Mar 2008)
II-K-9	NAWG supports giving adjacent landowners the right of first-refusal to purchase abandoned rail beds at a fair market appraised value comparable to adjacent property. (Mar 2008)
II-K-10	NAWG supports funding the local rail services assistance program and similar efforts to preserve rail service on low density lines. (Mar 2008)
II-K-11	NAWG opposes any further rail mergers in the United States unless the mergers are conditioned on the offering of open access to all captive rail shippers. (Mar 2008)
II-K-12	NAWG opposes the use of inverse rate structure by railroads and supports nondiscriminatory geographic rates and consistent, timely service for all grain shippers of all areas. (Mar 2008)
II-K-13	NAWG supports including final offer arbitration including pooling in any rail competition bill that moves through Congress. NAWG also supports allowing producers to bring final offer arbitration cases. (Feb 2009) [Committee]
II-K-14	NAWG supports maintenance and expansion of intermodal services for agricultural products. (Mar 2008) [Montana]
II-K-15	NAWG shall pursue all facets of rail issues that will provide relief to wheat growers on rail rates and service. (Nov 2008) [Committee]
II-L-16	NAWG supports transparency in the secondary rail market. (Feb 2009) (Minnesota)

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